IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 350.

JOHN BAD ELK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

At the April term of the United States Circuit Court for the district of South Dakota, A. D. 1899, John Bad Elk, the plaintiff in error, was tried upon an indictment returned into the District Court for the district of South Dakota, by the grand jury duly empanneled at said term of the court, charging him with having murdered one John Kills Back, on the 13th day of March, A. D. 1899, at the Pine Ridge Reservation in said district. The indictment (without setting out the formal part to which no objection is taken), is as follows:

That John Bad Elk, an Indian of the Sioux Tribe of Indians late of the Pine Ridge Reservation in said district, heretofore, to-wit: On the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine with force and arms at the Pine Ridge Indian Reservation in the district aforesaid, and within the exclusive jurisdiction of this court, in and upon one John Kills Back, unlawfully, willfully, feloniously, and of his malice aforethought, did make an assault, and the said John Bad Elk, one certain revolver, commonly called a six shooter, then and there loaded and charged with gunpowder and leaden bullets, which revolver, he, the said John Bad Elk, then and there held in his hand, then and there willfully, unlawfully, feloniously and of his malice aforethought, did discharge and shoot off, at, to, against, and upon the said John Kills Back, and that the said John Bad Elk, with a leaden bullet aforesaid, then and there by force of the gunpowder aforesaid, by the said John Bad Elk discharged and shot off as aforesaid, the said John Kills Back, in and upon the body of him the said John Kills Back, a little to the left of the center of the body in front and about two inches below the edge of tenth rib of him, the said John Kills Back, then and there unlaw-

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fully, willfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound; giving to him the said John Kills Back, then and there, with a leaden bullet aforesaid so as aforesaid shot, discharged, and sent forth out of the revolver aforesaid, by the said John Bad Elk, in and upon the body of him the said John Kills Back a little to the left of the center of the body in front and about two inches below the edge of the tenth rib of him, the said John Kills Back, one mortal wound, of which mortal wound, he, the said John Kills Back then and there on the same day, to-wit: On the thirteenth day of March in the year of our Lord one thousand eight hundred and ninety-nine, died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said John Bad Elk, him, the said John Kills Back, in the manner and form, and by the means aforesaid then and there willfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder, contrary to form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States.

To this indictment the defendant entered a plea of not guilty. And thereupon after hearing the testimony, the argument of counsel for the respective parties, the instructions of the court, upon due deliberation the jury returned into the court a verdict of guilty as charged in the indictment, without any qualification as to capital punishment.

That in the 19th day of April, A. D. 1890, the said defendant filed his motion in arrest of judgment, which motion was overruled by the court.

To which ruling and decision said defendant then and there duly excepted, which exception was then and there duly allowed by the court.

That thereupon at the said April term of said court, to-wit: On the 19th day of April, A. D. 1899, said court pronounced its judgment in this case, adjudging that this defendant, plaintiff in error, suffer the punishment of death, and that such penalty be carried out by the marshal of said district on the 16th day of June, A. D. 1899. And thereupon plaintiff in error sued out his writ of error in this case.

STATEMENT OF FACTS MATERIAL TO ERRORS ASSIGNED.

Testimony of B. C. GLEASON:

For about two years prior to the 13th day of March last I have been additional farmer, on the Pine Ridge Reservation, in South Dakota. The defendant was a policeman in my district, and resided with his wife in a cottage near the sub-agency buildings where I had resided and had charge.

I was instructed by the agent in charge of the Pine Ridge Indian Agency, to order the Indian policemen under my charge to arrest any Indian charged with any violation of the rules and regulations prescribed by the Commissioner of Indian Affairs, and cause them to be taken to the agency.

On the 8th day of March last, I heard a couple of shots at or near where the defendant resided. I came down to my house, went in and passed out at the side door of my house, as I stepped out of the door the defendant was passing. I asked him if he shot, he said that he did. I asked him what he shot for, he said that he shot in the air for fun. I said to him come around to the office in a little while and we will talk the matter over. I had always found the defendant to be truthful and gave the matter but little thought at the time, but a complaint was made to me with relation to the defendant. He did not come to my office for several days.

Question: Did you give directions to Lone Bear and Crow, two policemen on the 13th day of March last to arrest the defendant?

To which question defendant by his counsel then and there duly objected, for the reason that the question is immaterial and incompetent, and that the testimony does not show that the witness had any power or authority to direct the arrest of the defendant, nor that he had violated any law of the United States, or any rule or regulation of the Indian Department, neither does it appear that any process has been issued directing the arrest of the defendant.

Which objection was then and there overruled by the court, to which ruling the defendant then and there duly excepted, which exception was duly allowed.

Answer: I ordered Lone Bear and Crow, two policemen to go and arrest the defendant. I gave Lone Bear a letter directed to Major Clapp the agent at Pine Ridge, and told him to take the defendant to the agency at Pine Ridge.

The defendant was at this time stopping at his mother's, a short distance from the sub-agency of which I had charge.

I directed Lone Bear and Crow to report to me on Monday morning, March 13th. Crow failed to report. I directed Lone Bear to have High Eagle assist him in the arrest, and I notified John Kills Back, the deceased, to relieve Bad Elk as school policeman and to assist Lone Bear and High Eagle to arrest the defendant.

It was about twenty-five miles from where the defendant was stopping, to Pine Ridge Agency.

It was getting dark about the time Lone Bear, High Eagle and John Kills Back, the deceased, started for the defendant's mother's place where he was stopping the last time just before the killing

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of the deceased. Soon afterwards I heard some shots fired and heard a man groan. A report soon came that John Kills Back had been shot and killed. I sent some parties to bring in his body. He was dead when they arrived with the body at the school house near my office. He was killed on Pine Ridge Indian Reservation in South Dakota.

Cross-examination:

The direction that I gave for the arrest of the defendant, and for watching him and seeing that he did not get away, was not in writing; was given orally. Printed record page 11

Testimony of LONE BEAR:

I am a policeman at Pine Ridge Reservation, was on duty at station under Captain Gleason. He directed me to arrest John Bad Elk on the 13th of March last, and gave me a letter to Major Clapp, agent at Pine Ridge Agency. I was to go with Crow to arrest Bad Elk, but he was away and so High Eagle went in his place. We went up there but did not find defendant at his mother's. We then went back and reported to Captain Gleason. He told us to go back and arrest him. When we got there I stayed outside and High Eagle went in. He came out and I went in. Defendant was smoking. I told him that we had come to take him to Pine Ridge Agency. He said "all right, I will go with you, but the horse is used up, and I shall have to go to my brother's and get a horse and we will start in the morning. It is too late to start tonight." Then he went out and saddled his horse and started to Harrison White Thunder's to get a horse. I followed after. When he got to his brother's, his horses were out on the range and his brother said as soon as they come in he would bring the horses over. We then started back, John Bad Elk going ahead and I followed after. John Bad Elk went to his mother's and I went to the station and told Captain Gleason that John Bad Elk said that it was too late to go now, that he had been to his brothers to get a horse and that he said that he would go with us in the morning. Captain Gleason then said to us, go and keep watch of him and see that he did not go away and take him to Major Clapp at Pine Ridge in the morning.

John Bad Elk did not refuse to go with me to Major Clapp's at Pine Ridge any of the time, but said all the time that he would go in the morning, that it was too late to start that night.

He did not get back from attending to his duties with the schools until after four o'clock in the afternoon.

John Kills Back, High Eagle and I had our arms with us when we went up to where the shooting was done. It was getting dark when we started to where John Bad Elk was stopping. Just before we got there I stopped for a few minutes and John Kills Back

and High Eagle went on ahead. Pretty soon, and before I got up to where they were I heard some shots fired, and High Eagle came running by me and I fired and turned and ran. Page 12 and 13 printed record.

PINE BIRD'S testimony:

Just before the shooting was done I stepped out of my house close by where the defendant was stopping and found Shouts At there. We were standing close together and facing High Eagle and John Kills Back. Just then John Bad Elk came out near where we were standing and asked them, what, you here, bothering me all the time. John Kills Back said cousin, you are a policeman and know what the rules and orders are. John Bad Elk said yes, I know what the rules and orders are, did I not tell you that I would go with you in the morning. Just then John Kills Back turned sideways and moved a little forwards and then John Bad Elk fired and hit John Kills Back and he jumped and ran a little ways and fell down and got up and ran a little father and fell down and groaned, and asked for a drink of water. Printed record page 13.

SHOUTS AT'S testimony:

In the evening, just before the shooting, I was standing outside my house with Pine Bird, when John Kills Back and High Eagle came walking towards the house where John Bad Elk was stopping. They came up within two or three steps of us. We were facing them, just then John Bad Elk came out of the house near where Pine Bird and I were standing and asked them what you bothering me all the time for. John Kill Back said cousin, you are a policeman and know the rules and orders. Bad Elk said yes, I know the rules and orders, did I not tell you that I would go with you in the morning. Just then John Kills Back moved a little and John Bad Elk fired; John Kills Back ran past the end of a wagon box near a fence and fell, then he got up and went a little father and fell down again and called for some one to bring him a drink of water. After a little while I went out where he was. He died in a few minutes.

The shooting was after dark. There was quite an amount of snow on the ground. Just beyond the corner of the wagon box where John Kills Back fell near the fence there was a bank of snow. A day or two after the shooting where John Kills Back fell and his hand went into the snow I found his revolver. Printed record page 13.

JOHN BAD ELK'S testimony:

I am the defendant. I was a policeman on the 13th day of March last. During the day I had been attending to the schools

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up and down the creek near the station. That was my duty as a policeman. I arrived home at my mother's house about half-past four in the afternoon. Soon after I arrived at my mother's house High Eagle came into the house and stayed a minute or two, but did not speak, then went out door and Lone Bear came in and said that he was directed to take me to Pine Ridge to Major Clapp. I said all right, but my horse is used up, and I shall have to go to my brother's, Harrison White Thunder, and get another horse. Lone Bear said all right. Then I went out, saddled my horse and started for my brother's house and Lone Bear followed some distance after. My brother's horses were out on the range. He said when they came in he would bring one down to me. After Lone Bear and I got some coffee, I started back and he came along some distance behind.

After I had been at my mother's a short time my brother, Harrison White Thunder, came with the horse. He told me that John Kills Back was coming with a bad heart. He left the horse and went towards the farmers.

After he had been gone a little while I went out door and saw John Kills Back and High Eagle, Pine Bird and Shouts At near the house. I asked John Kills Back and High Eagle what they were bothering me all the while for. John Kills Back said you are a policeman and know what the rules are. I said yes, I know what the rules are, but I told you that I would go to Pine Ridge Agency in the morning. Then he moved a little forward and put his hand around as if to reach for his gun. I saw the gun and shot. I shot because I knew that they (John Kills Back and High Eagle) would shoot me. I saw their revolvers at the time that I shot. Printed record page 15 & 16

ASSIGNMENT OF ERRORS.

1st. The Court erred in allowing B. C. Gleason, a witness called and sworn on the part of the prosecution, to testify on said trial, against the objection of the defendant, that on the 13th day of March, A. D. 1899, he ordered and directed Lone Bear and another policeman, to arrest your petitioner for some act or omission of defendant occurring on the 8th day of March, 1899, there being no written authority for such arrest.

2d. The Court erred in refusing to charge the jury and give them the following instruction as requested by the defendant:

"If you find from the evidence offered in this action, that at the time the defendant John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude and actions of John Kills Back, that he had a design to take away his life, or to do him some great bodily injury and there was reasonable ground to be-

lieve the danger imminent that such design would be accomplished, he would have a right to act upon such appearences and kill the deceased, if that was necessary to avoid the apprehended danger; and the killing would be justifiable, even though it might afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done."

3d. The Court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"In determining the question of whether there was reasonable cause to believe that danger to the defendant was imminent, at the time that he fired the shot that killed John Kills Back, you may properly take into consideration the fact that the defendant and the deceased were Indians, together with the habits, customs and education of the Indians on the reservation from which they came and where they lived; and also the fact if you shall so find it from the evidence in this action, that the defendant had been told presently before the killing, that the deceased came to the defendant's place of residence at the last time that he did so with a bad heart."

4th. The Court erred in refusing to charge the jury and to give them the following instruction requested by the defendant:

"Before you can properly convict the defendant of the charge contained in the indictment in this action, you must be satisfied from the evidence submitted to you, that there was not reasonable ground for the defendant to believe that there was imminent danger that his life would be taken, or that he was in danger of sustaining great bodily injury at the hands of the deceased at the time he fired the shot that killed the deceased."

5th. The Court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The burden of proof rests upon the prosecution to satisfy you beyond a reasonable doubt, not only that the defendant killed the deceased, but that he killed him without any reasonable or probable cause to believe that his life was in imminent danger, or that he was in imminent danger of suffering great bodily injury."

6th. The Court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action, prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them."

And thereupon the Court charged the jury among other things as follows:

"The deceased, John Kills Back, had been ordered to go and

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make the attempt to arrest the defendant. The defendant had no right to resist him.

"I charge you, of course, that the officer, John Kills Back, had a right to determine for himself when this man should go to the agency.

"The deceased had a right to show his revolver. I say to you also that if you find him guilty, you have a right to qualify your verdict by adding thereto the words without capital punishment."

7th. To each of which said instructions by the Court, the defendant before the jury retired then and there duly excepted; and now assigns the same as error.

8th. The Court erred in adjudging the death penalty against this defendant, by its judgment and sentence upon the verdict of the jury in this case.

Wherefore, the said John Bad Elk, prays that the judgment and sentence of the said Circuit Court of the United States for the district of South Dakota, be reversed and set aside.

ARGUMENT.

The first proposition that will be considered, is that growing out of the ruling of the Court in admitting the witness on the part of the prosecution, B. C. Gleason, to testify that he ordered the policemen to go and arrest the defendant; and the charge of the court that they had a right to go and make the attempt to arrest him, which was equivalent to instructing the jury that they had a right to arrest him. These may properly be considered under one head as they involve the question of whether the witness Gleason had a right to order the defendant's arrest, as well as that of the policemen to make the arrest.

It is contended on the behalf of the defendant that the testimony of the witness was immaterial and incompetent and that he had no power or authority to direct the arrest of the defendant, that he had not violated any law of the United States, or any rule or regulation of Indian Department, neither does it appear that any process has been issued directing the arrest of the defendant. The ground upon which it is claimed that the instruction of the Court is erronious is that the evidence did not show that any offense had been committed by the defendant, neither did it show that there was reasonable cause to believe that he had committed any offense, nor that any process had been issued directing his arrest.

The defendant being a resident of the United States, by virtue of the treaty of 1868, the agreement of 1877, and the statute of 1885 hereinafter more particularly cited, having been made amenable to the laws of the United States, was entitled to the protection of those laws in his personal liberty and security as much as any citizen thereof.

The only act so far as the testimony discloses, of which the defendant had been guilty at the time the witness Gleason ordered his arrest on the 13th day of March, was that he had fired a shot in the air on the 8th day of March, for fun, and that he did not come to the office of the farmer Gleason for several days after he had been directed to do so to talk over the matter. That during the interval between the 8th day of March and the 13th he had been stopping at his mother's and attending to the schools near there, as was his duty as such policeman.

There was no pretense that any other act had been committed that could be construed into a violation of the laws of the United States, or of any rule or regulation of the Indian Department. It is not claimed or shown by the evidence that any process had been issued by any court or officer for his arrest, neither can it be claimed that at the time the arrest was ordered, on the 13th day of March, that he was committing any crime, or doing any act in violation of the rules or regulations of the Indian Department.

This leads to the inquiry, when and under what circumstances a person may be arrested for a crime.

The only statute of the United States that I can find that authorizes an arrest to be made by a Federal officer for a criminal offense, are the following sections of the Revised Statutes:

Revised Statutes of the United States, sections 788 and 1014.

Section seven hundred and eighty-eight provides, "that the marshal and their deputies shall have, in each state, the same powers, as sheriffs and their deputies in such state may have, by law, in executing the laws thereof."

Section ten hundred and fourteen provides, that, "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and ageeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense, etc."

We must look to the statutes of South Dakota, then, for the purpose of ascertaining when and under what circumstances, an arrest upon a criminal charge may be made or ordered; unless one of these petty officers on an Indian reservation, are, as they sometimes act as though they were, above and beyond the law; acting sometimes most unfortunately as though they were a law unto themselves, as would seem to have been the fact in this case.

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The law of South Dakota as to when and under what circumstances an arrest upon a criminal charge can be made, and the persons who may make or order an arrest to be made, is as follows :

Arrest, when and by whom made.

An arrest may be made either by a peace officer under a warrant, by a peace officer without a warrant, or, by a private person.

Compiled laws South Dakota, 1887, section 7139.

An arrest for a felony may be made on any day, and at any time of the day or night. If it is a misdemeaner, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed on the warrant.

Compiled laws South Dakota, section 7141.

The officer must inform the defendant that he acts under the authority of the warrant if required.

Compiled laws South Dakota, section 7144.

If, after notice of intention to arrest, the defendant either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

When a Peace Officer May, Without a Warrant, Arrest a Person.

1st. For a public offense, committed or attempted in his presence.

2d. When the person arrested has committed a felony, although not in his presence.

3d. When a felony has in fact been committed, and he has reasonable cause to believing the person arrested to have committed it.

4th. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.

Compiled laws South Dakota, 1887, section 7148.

When arresting a person without a warrant, the officer must inform him of his authority and the cause of his arrest, except when he is in the actual commission of a public offense, or is pursued immediately after an escape.

When a Magistrate May Direct the Arrest of a Person.

When a public offense is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

Compiled laws South Dakota, 1887, section 7153.

When a Private Person May Arrest Another.

A private person may arrest another:

1st. For a public offense committed or attempted in his presence.

2d. When the person arrested has committed a felony, although not in his presence.

3d. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

Compiled laws South Dakota, 1887, section 7154.

This is a substantial reenactment of the Common Law with relation to arrests for crimes. It is there provided that an arrest for crime may be made in four ways: 1st. By warrant; 2d. By an officer without warrant; 3d. By a private person also without a warrant; 4th. By a hue and cry. And then provides that an arrest may be made without warrant as follows:

1st. A justice of the peace may apprehend, himself, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence.

2d. The sheriff, and the coroner may apprehend any felon within the county without warrant.

3d. A constable may without warrant arrest any one for a breach of the peace committed in his presence. And in cases of felony actually committed, or a dangerous wounding, whereby a felony is likely to ensue, may upon probable suspicion arrest the felon, and

4th. A private person that is present when any felony is committed is bound by the law to arrest the felon, and upon probable suspicion, also, a private person may arrest the felon or other person so suspected.

4 Blackstone's Commentaries, (Sharswood's Ed.), pages 298 to 294, inclusive.

An examination of the Revised Statutes of the United States, 1878, and the acts of Congress passed since that time, will disclose, that the only statutes of the United States, that by its terms expressly authorized any officer of the United States to arrest a person upon a criminal charge without process, is section 5522 Revised Statutes, which was repealed by the 25th chapter of the act of February, 1894, page 36, General Laws of the United States.

As has been already said, we must look to the statute of South Dakota and the decision of the courts under similar statutes, to ascertain when, and under what circumstances, a Federal officer may arrest a person without process, upon a criminal charge.

The following cases will illustrate the principle contended for by the defendant in this action :

Wahl vs. Walton, 30 Minn., 506, (S. C. 16 N. W. R., 397.)
Quinn vs. Heisel, 40 Mich., 576.
People vs. McLean, 36 N. W. R., 231.
Sarah Ways Case, 41 Mich., 299, (S. C. 1 N. W. R., 1021.)
People vs. Haley, 84 Mich., 495, (S. C. 12 N. W. R., 671.)
Commonwealth vs. Carey, 12 Cush. (Mass.), 246.

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Commonwealth vs. McLaughlin, 12 Cush. (Mass.), 615.
People vs. Pratt, 22 Hun., (N. Y.), 300.
Shanley vs. Wells, 71 Ill., 78.
Johnson vs. Garnette, 10 Bush. (Ky.), 221.

These cases hold that an officer cannot arrest a person guilty of a past offense without a warrant, unless such offense amounts to a felony. Under these statutes and decisions the defendant would not have been liable to arrest without process unless he had committed some crime as defined by the statutes of the United States amounting to a felony, or that there was reasonable cause to believe that he had. The evidence in this case shows not only that he had not committed any act that amounted to a felony, but it also shows that there was no reasonable cause to believe that he had, and that the act for which it was sought to arrest him on the 13th day of March, done on the 8th day of March, was not a crime as defined by the statutes of the United States, and further that it was not done in the presence of any peace officer. Inasmuch therefore as no justification can be found under the statutes and decision of the courts justifying either the witness, B. C. Gleason, to order his arrest, or the policemen to make an arrest, we have no other source to look to for a justification of such acts or either of them, except the treaty made between the United States and these Indians, ratified by Congress on the 29th day of April, 1868. See General Laws of the United States, volume 15, page 135, and the agreement entered into between the same parties, February 28th, 1877, volume 19, Statute United States, page 254.

Under this treaty, which repealed all other treaties with these Indians, they did not surrender to the government the right to regulate or control them so far as their personal relations with each other was concerned, neither had congress at that time passed any statute providing for the punishment of these Indians for any crime committed by one member of the tribe against another, as this court held in the Crow Dog case 109, U. S. 556, (S. C. 3 S. C. R., 396). In this case the Court held that the murder of one Indian by another, in the Indian country is not an offense against the laws of the United States, since the clause in section two thousand forty-six of the Revised Statutes excepting crimes committed by one Indian against another from the operation of the general laws of the United States, is not repealed, either expressly or by implication, by the treaty of 1868, or by the agreement of 1877, but remains in full force.

The defendant, therefore, was not liable to arrest so far as the United States was concerned, either with or without process, unless he had violated the provisions of section nine of the Act of March 3d, 1885, providing for the punishment of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, or that there was reasonable cause to believe

that he had; or had violated the rules and regulations prescribed by the President for carrying into effect the various provisions of any act relating to Indian affairs and for the settlement of accounts of Indian affairs.

Revised Statutes, section 465.

For a violation of the rules and regulations of the Government of Indian affairs, the defendant would only be liable to be tried by the Indian court of the tribe to which he belonged, and as none of these constituted a felony, the farmer and witness, Gleason, had no authority or right to direct his arrest without such violation was committed in his presence, and even though the act alleged to have been committed was a violation of these regulations and committed in the presence of the witness, five days having intervened between its commission and the time the arrest was ordered, the witness had lost whatever right he would have had to direct the arrest of the defendant for an act committed in his presence.

The offense created by the rules and regulations for the government of the Indians and of which Indian courts have jurisdiction are the following:

1st. The sun dance, the scalp dance, the war dance and all other so-called feasts assimulating thereto shall be considered Indian offenses.

2d. Any plural marriage hereinafter contracted or entered into by any member of the tribe under the supervision of a United States Indian agent, shall be considered an Indian offense cognizable by the court of Indian offenses.

3d. The usual practices of so-called "medicine men" shall be considered "Indian offenses."

4th. Any Indian under the charge of a United States Indian agent who shall willfully destroy, or with intent to steal or destroy, shall take and carry away any property of any value or description, being the property free from all tribal interference, or of any other Indians, shall without reference to the value thereof, be deemed guilty of an "Indian offense."

5th. Any Indian or mixed blood who shall pay or offer to pay any money or other valuable consideration to the friends or relatives of any Indian girl for the purpose of living or cohabiting with said girl or woman, shall be deemed guilty of an "Indian offense."

Rules and regulations of the Indian office, page 106-107.

It might become material here to consider whether an Indian court has a valid existence under the law, and whether a violation of the rules and regulations of the Indian Department constitutes a crime.

The only authority that I have been able to find, under which Indian courts are created, or under which they can be said to exist and exercise jurisdiction, are sections four hundred sixty-five

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and four hundred and sixty-three of the Revised Statutes, the acts of Congress from and including the year 1890, to the present time making appropriations for the payment of Indian judges, the agreement of February 28th, 1877, *supra* and section five hundred eighty, page 105 of the rules and regulations of the Indian office.

Section four hundred sixty-five of the Revised Statutes provides as follows:

The president may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs and for the settlement of the account of Indian affairs:

Section four hundred sixty-three provides, that the commissioner of Indian affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and matters arising out of Indian relations.

The acts of Congress making appropriations for the payment of Indian judges, which simply appropriates a certain sum of money for that purpose.

The agreement of February 28th, 1877, so far as material to the question under consideration, is as follows:

And they do solemnly pledge themselves that they will at all times maintain peace with the United States, that they will observe the laws thereof, and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868, and the present agreement, and to that end will whenever requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary.

Section five hundred and eighty of the rules and regulations of the Indian office is as follows:

There shall be established at each Indian Agency except the agency for the five civilized tribes in the Indian Territory, a tribunal, consisting of three Indians (except where the number shall be increased or diminished by special direction of this office), to be known as "the court of Indian offenses," and the members of said court shall each be styled "judge of the court of Indian offenses."

It can hardly be claimed that section 465 of the Revised Statute confers power upon the President to create a court, for the only power conferred on him by virtue of that section is, that he may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.

Section four hundred sixty-three, does not confer the power, for that section only confers power on the commissioner of Indian affairs under direction of the Secretary of the Interior to have the management of Indian affairs agreeably to such regulations as the

President may prescribe. He can exercise no greater power or authority than is conferred upon the President, and he can prescribe no rules or regulations except for the purpose of carrying into effect the provisions of an act of Congress relating to Indian affairs.

A difficulty arises however with relation to the power of the President to create a court, in that the constitution provides that the judicial power of the United States, shall be vested in one Supreme court, and such inferior courts as the Congress may from time to time ordain and establish.

Article 3, section 1, constitution.

It is difficult to understand how a Federal court can be created or exercise jurisdiction within the limits of the United States, except by virtue of the constitution, or of an act of Congress creating such Court and conferring jurisdiction thereon; as article three, section one of the constitution provides, "that the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish.

It might become material therefor to ascertain how Indian Courts were created and by virtue of what authority they exercise jurisdiction, and the extent of such jurisdiction.

Section five hundred eighty, page one hundred five of the Regulations of the Indian office, adopted in 1884, and published in 1894, seems to be the source from which such courts derive their existence, and exercise their jurisdiction. This section of the regulations create the Court and prescribe the offenses over which they may exercise jurisdiction, and is as follows:

There shall be established at each Indian agency except the agency for the five civilized tribes in the Indian Territory, a tribunal, consisting of three Indians (except where the number shall be increased or diminished by special direction of this office), to be known as the "Court of Indian Offenses", and the members of said court shall be styled "Judges of the Court of Indian Offenses". Agents may select from the members of the tribe, persons of intelligence and good moral character and integrity, and recommend the same to this office for appointment as judges. Each judge shall be appointed by this office for the term of one year.

Then follows regulations for the terms of such court, and the offenses over which they may exercise jurisdiction, which are the same as heretofore quoted and contained in rules 4, 5, 6, 7 and 8, of the rules and regulations, page 105, *supra*.

This section 580 of the regulations of the Indian office, and the acts of Congress commencing with the year 1890 *supra*, and continuing to the present time, making appropriations for the payment of Indian judges, constitutes the only foundation upon which it can be claimed that Indian courts have a legal existence.

Conceding that these various acts of Congress appropriating

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money for the payment of Indian judges would in effect be creating such courts by act of Congress, the most that could be claimed would be, that such courts could exercise jurisdiction over such offenses and such only as are prescribed in rules 4, 5, 6, 7 and 8 of the regulations of the Indian office. And unless the defendant had violated these rules or some one of them, or had committed one of the crimes mentioned in the act of March 3d, 1885 *supra*, neither the Indian police or any one else had a right to arrest him either with or without process.

Another difficulty that suggests itself with relation to these Indian courts is that it is provided by the agreement of 1877 *supra*, made between these Indians and the United States, that they will loyally endeavor to fullfill all the obligations assumed by the treaty of 1868 and the present agreement (being the agreement of 1877) and to that end will, whenever requested by the President of the United States, select so many suitable men from each band to co-operate with him in maintaining order and peace on the reservation as the president may deem necessary.

A fair construction of this agreement would require that whenever the Congress of the United States provided for the punishment of offenses committed on this reservation and a tribunal for the trial thereof, that these Indians will peaceably submit thereto; but that as to other matters not constituting an offense under the statutes of the United States, they were to have a voice in the selection of the men who should be authorized to maintain order and peace on the reservation; but so far as these rules and regulations are concerned they have no voice in their selection whatever, they are entirely ignored.

It would seem, therefore, that this court would be slow to hold that these Indian courts came within the purview of this agreement, or that congress, in this indirect way (by these appropriation bills providing for the payment of Indian judges) intended to ignore this agreement solemnly entered into by the United States with these Indians, and thereby created courts, and made a violation of the rules and regulations of the Indian office a criminal offense, subjecting the person violating the same to imprisonment.

This court has held in the case of the United States against Eaton, 144 U. S., 677; 12 S., C. R., 764-767, that regulations prescribed by the President and by the heads of the departments, under authority granted by congress, may be regulations prescribed by law, so as to lawfully support acts done under them and may thus have the force of law; but it does not follow that a thing so required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense. Therefore in this case there being no statute making it a criminal offense to violate the rules and regulations of the Indian

department, the defendant was not liable to arrest for a violation of such rules and regulations.

Had the defendant violated either of these rules four, five, six, seven or eight, or the act of March 3d, 1885? The testimony shows that all he had done was to fire two shots in the air for fun, but this act was not an offense either under these rules, or the statute.

It may be urged that the policemen who sought to arrest the defendant being officers, will be presumed to be there in the proper discharge of the duties of their office, but this would be like the presumption at one time indulged in "that the king can do no wrong," but this presumption can hardly be indulged in this country, and must give way to that other presumption thrown around the defendant by the constitution and laws as his shield and protection, that a man is presumed innocent until he is proven guilty. And the evidence in this case shows that the defendant had not committed any crime or offense. Therefore, neither the farmer, Gleason, had any authority to direct his arrest, or the policeman to make it, unless such authority can be found in the statutes of South Dakota; as the statutes of the United States provides that, as to proceedings with relation to the arrest of offenders, they must conform to the usual mode of process in the state where the defendant may have committed an offense; and as we have seen no authority under the facts as they appear in this case would justify his arrest.

If correct in the conclusion that no Indian court has been legally established in this reservation, that the defendant has not violated any statute of the United States, or any of the rules or regulations of the Indian office or that Congress has not made a violation of those rules a criminal offense, then the instruction of the Court that the policemen had a right to attempt to make the arrest of the defendant was erronious, and for that reason the judgment of the Court should be reversed.

The Court erred in refusing to give to the jury the following instruction, at the request of the defendant:

If you find from the evidence offered in this action, that at the time the defendant John Bad Elk, fired the shot that killed the deceased, John Kills Back, the defendant had reasonable cause to apprehend from the manner, attitude and actions of John Kills Back, that he had a design to take away his life, or do him some great bodily injury, and there was reasonable ground to believe the danger imminent that such design would be accomplished, he would have a right to act upon such appearances and kill the deceased, if that was necessary to avoid the apprehended danger, and the killing would be justifiable, even though it might afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, nor danger that it would be done.

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That this instruction is correct, and should have been given to the jury, is fully established by the following cases:

People vs. Shorter, 2 Comstock (N. Y.), 193.
Campbell vs. People, 16 Ill., 17.
Schnier vs. People, 23 Ill., 17.
Maher vs. People, 24 Ill., 241.
Roach vs. People, 77 Ill., 25.
Steinmeyer vs. People, 95 Ill., 383.
Lange vs Commonwealth, 38 Penn. St., 265.
Murray vs. Commonwealth, 79 Penn. St., 311.
Pond vs People, 8 Mich., 150.
Holloway vs. Commonwealth, 11 Bush. (Ky.), 344.
Stanley vs. Commonwealth, 6 S. W. R. (Ky.), 155.
People vs. Anderson, 44 Cal., 65.
State vs. Sloan, 47 Mo., 604.
Patillo vs. State, 22 Texas App. 586-3 S. W. R., 766.
Spearman vs. State, 4 S W. R. (Texas App.), 586.
United States vs. King, 34 Fed. 302.

The Court upon refusing to give the foregoing instruction upon request of the defendant, gave in lieu thereof the following instruction:

If you believe from all the evidence in this case beyond a reasonable doubt, that while the deceased was standing there at the place mentioned in the evidence, with his hands at his side and did nothing further than to ask the defendant to come with him and say to the defendant that he, defendant, knew the rules and orders of the Reservation, and without any other provocation the defendant took out his revolver and shot him, then your verdict must be "guilty of murder," because the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied.

On the other hand, if you should have reasonable doubt of the truth of the facts just stated, you should acquit, or, if you should further believe that at the time these parties met there where the killing actually occurred, the defendant had reasonable grounds to believe and in good faith believed that the deceased intended to take his, defendant's life, or to do him great bodily harm, then the defendant had a right to meet such attack with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his life or to protect himself from great bodily injury, even to taking the life of deceased.

In this connection I desire to say to you gentlemen of the jury, that the deceased being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant, he would have the right to show his revolver. He would have had the right to use only so much force as was necessary to take his prisoner, *and the fact that he was using no more force than was necessary to take*

his prisoner would not be sufficient justification for the defendant to shoot and kill him.

The defendant contends that inasmuch as the testimony in this case shows that at the close of the conversation between the deceased and the defendant immediately preceding the shooting, the deceased advanced toward the defendant a step, put his hand around as to draw his revolver and did draw it, that it was found where his hand went into the snow where he fell (see testimony of defendant page 15 of printed record of Pine Bird, page 23, and of Shouts At, page 43 of printed record), entitled him to have this case submitted to the jury, upon the question of self-defense clearly, fully and fairly.

That the instruction of the Court upon this subject did not do so is apparent from the fact, that the Court in saying to the jury that the defendant must have believed "in good faith" that the deceased intended to take defendant's life, that defendant must have "honestly believed" that it was necessary to take decedent's life to save his own or to protect himself from great bodily injury, followed by the statement of the Court, that "the fact was that the deceased was using no more force than was necessary to take his prisoner," was not a full and fair statement of the law of self-defense.

By this instruction the Court stated, not by way of an opinion, but as a positive statement of fact, that the deceased used no more force than was necessary to take his prisoner, and therefore as a whole, carried to the jury the implied conclusion at least of the Court that in the opinion of the Court the defendant did not act honestly or in good faith; and besides this instruction withdrew from the consideration of the jury the right to act upon the apprehended danger to his life, or serious injury to his person growing out of the conduct, attitude and actions of the deceased at the time the defendant fired the shot that killed the deceased, but carried with it to the jury a statement that under the law the danger to the defendant must have been actual and real, before the defendant could justify the killing under the plea of justifiable homicide.

Patillo vs. State, 22 Texas App., 586- 3 S. W. R., 766.
Spearman vs. State, 23 Texas App., 224- 4 S. W. R., 586.

and cases cited last above, in connection therewith.

It appearing from the testimony in this case that the defendant had neither violated any law of the United States, nor any of the rules or regulations of the Indian Department, the Court erred in refusing to give the following instruction asked by the defendant.

From the evidence as it appears in this action, none of the policemen who sought to arrest the defendant in this action prior to the killing of the deceased, John Kills Back, were justified in arresting the defendant, and he had a right to use such force as a reasonably prudent person might do in resisting such arrest by them.

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Commonwealth vs. Carey, 12 Cush. (Mass.), 246.
Commonwealth vs McLaughlin, 12 Cush. (Mass.), 615.
Roberts vs. State, 14 Mo., 138.
Jones vs. State, 14 Mo., 409.
State vs. Medlin, 1 Wins. (N. C.), L. No. 2, 97.
Commonwealth vs. Drew, 4 Mass , 391.

Instructions that assume the existence of material facts in dispute in a criminal case is calculated to mislead a jury, and is erroneous.

The Court erred in instructing the jury "that the use of a deadly weapon, such as has been introduced in evidence here, consisting of a six-shooter or revolver, is evidence from which malice is implied."

The Judgment of the Court Imposing the Penalty of Death Was in Excess of its Power.

In considering this proposition, three questions naturally present themselves for consideration:

1st. Is there any provision in the Revised Statutes of the United States, under which the defendant could be tried and convicted for the crime with which he is charged in the indictment in this action?

2d. Is there any statute passed since such revision, under which he could be tried and convicted, and

3d. If there has been such a statute passed, has it been repealed or so modified that he cannot now be sentenced to punishment of death?

The first question was determined by this Court in the Crow Dog case, 109 U. S., 556. In this case this Court held that the murder of one Indian by another in the Indian country was not an offense against the laws of the United States, since the clause in section 2146 of the Revised Statutes, excepting crimes by one Indian against another from the general laws of the United States, is not repealed, either expressly or by implication, by the treaty of 1868 or the agreement of 1877, but remain in full force.

This opinion was rendered in December, 1883, and there was no legislation on the part of Congress affecting their relations or making them amenable to the laws of the United States, for any act, injury or wrong committed by one Indian against another, on their reservation until the act of March 3d, 1885, 23 statute at large, page 385, which, so far as it affects the question at issue in this case, is as follows:

That immediately upon and after the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor

to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases.

And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

This act being unrepealed or modified no question could be made as to the liability of an Indian to be tried for any of the offenses named in the foregoing act before the courts therein mentioned.

United States vs. Kagima, 118 U. S., 375- 6 S. C. R., 1109.
Expart parte Gon Shay-ee, 130 U. S., 542, S. C. R., 343.

By this act the government assumed an entirely new attitude with relation to these Indians.

By this act the Government held these untutored Indians, just emerging from a savage state, to the same degree of accountability, and required them to adopt the same code of morals, and subjected them to the same penalties in relation to their conduct and acts towards each other, as has been enacted for the government of the most enlightened and educated people in the affairs of life. While it is not the province of this Court, by its decision to alter or diminish the punishment provided by this act, yet it may take into consideration the condition and habits of these people in arriving at a conclusion as to the purpose and intent of Congress, in passing the act of January, 1897, being chapter 29 of the General Laws of 1897, so far at least as such intent may be deduced from the terms of such Act, which is as follows:

Section 1. That in all cases where the accused is found guilty of the crime of murder or rape under sections 5339 or 5345, Revised Statutes, the jury may qualify their verdict, by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life.

Section 2. That except offenses mentioned in section 5332, 1342, 1624, 5339 and 5345, Revised Statutes, when a person is convicted of any offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, and when any person is convicted of any offense to which the punishment of death or a lesser punishment, in the discretion of the court, is

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affixed, the maximum punishment shall be imprisonment at hard labor for life.

Section 3. That the punishment of death prescribed for any offense specified by the *statutes* of the United States, except in sections 5332, 1342, 1624, 5339 and 5345, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act is hereby repealed.

Section 4. That nothing herein contained shall apply to or in any way affect any proceeding or indictment now found or pending or that may be found for any offense committed before the passage of this act, and all offenses committed before the passage of this act shall be punished under the laws then in force: Provided, that juries may return qualified verdicts in such cases according to the provisions of section one of this act, and the sentences shall be imposed as therein provided.

Section 5. That any Indian who shall commit the offense of rape within the limits of any Indian reservation shall be punished by imprisonment at the discretion of the Court. So much of the ninth section of chapter 341 of the Acts of the year 1885 as is inconsistent herewith is herewith repealed.

This act seems to be a revision of the Revised Statutes, as well as all other Statutes of the United States, in which the punishment of death has been prescribed as a penalty for the commission of any crime against the laws of the United States.

We should therefore look to the Revised and other Statutes of the United States and ascertain in what cases the penalty of death was imposed, passed prior to the Act of January, 1897. And since the Act of 1897 is an Act to reduce the cases in which the penalty of death may be inflicted, and being a remedial Act should be construed liberally so as that such penalty shall not be inflicted in any case not clearly within its provisions, even though it did not contain any repealing clause.

United States vs. Claflin, 97 U. S., 546.
United States vs. Tynen, 11 Wall., 88-91.
Murdock vs. City of Memphis, 20 Wallace, 590-611.
Kent vs. United States (Circuit Court Appeals), 73 Fed., 680.
Rogers vs. Nashville C. & St. L. Ry. Co. (C. C. A.), 91 Fed, 323.
Norris vs. Crocker et al., 18 How, 429.

In construing an act of legislation whether a statute enacted by the legislature or a constitution established by the people as the supreme law of the land, regard must be had to all parts of the Act, and to the condition and history of the law as previously existing.

United States vs. Wang Kim. Ark., 169 U. S., 649- 18 S. C. R., 456-458.
State vs. Forkner, 70 Ind., 241.

Words in a statute will never be construed as meaningless and

surplusage if a construction can legitimately be found which will give force to and preserve all the words of a statute, and every sentence and clause should be given effect, and taken into account in order to determine the intent of the legislature.

Leversee vs. Reynolds, 13 Iowa, 310.
Opinion of the Justices, 22 Pick. (Mass.), 571.
Hagenbeck vs. Rogers, 3 Neb., 17.
James vs. Dubois, 16 N. J. L. (Harr.), 285.
Hitchins vs Niblo, 4 Black. (Ind.), 148.

Courts when endeavoring to ascertain the intention of the legislature will be justified, in some circumstances in considering the injustice that may arise from a particular construction of a statute.

Bate Refrigerating Co. vs. Suzberger, 157 U. S., 1-15 S. C. R., 508-516.
Wilson vs. Rosseau, 4 How , 646-680.
United States vs. Fisher, 2 Cranch, 358-385.

In construing remedial statutes, it is an established rule, that cases not within the letter, but within the reason of a statute, will be embraced within its provisions.

State vs. Canton, 43 Mo., 48.
Middleton vs. Greson & Cases cited, 106 Ind., 18-5 N. E. R., 755.
City of Evansville vs. Summers, 108 Ind., 189-9 N. E. R., 81-83.

Applying these rules to the construction of the Act of January 15th, 1897, *supra*, the defendant contends that the penalty of death cannot be imposed upon him in this case for the following reasons:

That in passing the Act of 1897, Congress had in mind those persons and those only, who could be convicted under sections 5332, 1342, 1624, 5339 and 5345, as those sections were construed by this Court in the Crow Dog case, 109 U. S., 556. That such was the intent of Congress, seems manifest, for that in section 2 of the Act of 1897, Congress has excepted from the operation of that Act the persons and offenses included within and covered by the above sections of the Revised Statutes, and repealed the death penalty in all cases in which the punishment of death is specifically affixed by the laws of the United States, and also in cases where a person is convicted of an offense to which the punishment of death, or a lesser punishment in the discretion of the Court is affixed, and to the latter the maximum punishment is imprisonment for life. By section 3 of the Act of 1897, Congress abolished the death penalty for all offenses specified by the statutes of the United States, except in sections 5332, 1342, 1624, 5339 and 5345 Revised Statutes.

It would seem as though Congress in passing the Act of 1897, intended to and had divided the persons and offenses then punishable with the death penalty into two classes, to-wit: those

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punishable under sections 5339, 1342, 1624 and 5345 Revised Statutes, as construed by this Court in the Crow Dog case composing one class, and those coming within other sections of the Revised Statutes, and other statutes of the United States, in another class.

It will be observed that under the provisions of section 1 of the Act of 1897, that it is only when the accused is convicted under sections 5339 and 5345 Revised Statutes, that the penalty of death can be imposed, and in which the jury may qualify their verdict by adding thereto "without capital punishment," and that when the verdict is so qualified the accused shall be sentenced to imprisonment at hard labor for life. The defendant could not be tried or convicted under either of those sections; he could only be tried and convicted under and by virtue of section 9 of the Act of March 3d, 1885.

Sections 5339 and 5345 are carried in connection with sections 5332, 1342 and 1624 into sections 2 and 3 of the Act of 1897, and the death penalty retained as to the offenses covered by those sections of the Revised Statutes, and repealed or abolished as to all offenses covered by other provisions of the Revised or other statutes of the United States.

Section 2 of the Act of 1897, after excluding the persons and offenses contemplated by sections 5332, 1342, 1624, 5339 and 5345 Revised Statutes of the United States, abolishes the death penalty as to every other offense covered by the provisions thereof, in which the punishment of death may be imposed. Thus showing that by sections 1 and 2 of the Act of 1897, that Congress was legislating with reference to and had in contemplation those offenses and those only, covered by the various sections of the Revised Statutes, in which the punishment of death was affixed. Then as if to put the purpose and intent of Congress beyond any possible peradventure they added section 3 of the Act of 1897, which provided as follows:

That the punishment of death prescribed for any offense specified by the *Statutes* of the United States, except in sections 5332, 1342, 1624, 5339 and 5345 *Revised Statutes*, is hereby abolished, and all laws and parts of laws inconsistent with this Act is hereby repealed.

Sections 1342 and 1624, included with sections 5332, 5339 and 5345 of the Revised Statutes, in sections 2 and 3 of the Act of 1897, which provides for the punishment of offenses committed by those in the military service of the United States (and for which the persons committing them, can only be tried by a military court or tribunal), taken in connection with the other sections contained therein, are significant as showing that Congress in associating them, each with the other, in the same clause of sections 2 and 3 of the Act of 1897, had in mind in legislating in relation thereto, those persons and those only, who might be tried

and convicted under the sections of the Revised Statutes enumerated therein, within the rule established by this Court in the Crow Dog case.

Section 5332 Revised Statutes is the one that provides for the punishment of treason; deemed in the law the gravest offense of which a person can be found guilty. The punishment for this offense as prescribed by this section, is death, or imprisonment at hard labor for not less than five years, etc., in the discretion of the court; and is the only offense mentioned in the Revised Statutes, in which the penalty provided, is death, or imprisonment in the discretion of the Court; but under section 2 of the Act of 1897, the death penalty is abolished for this offense, and the maximum penalty fixed at imprisonment at hard labor for life.

In section 5372, Revised Statutes, the penalty for murder is death, but under section 2 of the Act of 1897, the penalty of death is abolished as to the offense therein defined, and the maximum punishment therefor fixed at imprisonment for life, and the same is true as to many of the other offenses in which the penalty of death in the Revised Statutes is prescribed.

Section 9 of the Act of March 3d, 1885, provides that when an Indian commits any of the offenses therein defined, he shall be punished in accordance with the laws of the Territory, whether committed within or without an Indian reservation. If, therefore, it should so happen that the laws of the Territories or any one of them did not prescribe the penalty of death for murder, then we should have this anomalous condition in the law, that an Indian committing the crime of murder at one place in the United States could only be sentenced to imprisonment, while if he committed the same act in another place therein he might be sentenced to the death penalty; and yet in each case he is tried under the same Act and by courts created by a law of the United States. The Act of March 3d, 1885, having provided that the punishment of death should be imposed upon an Indian committing the crime of murder against another Indian in the Territories of the United States, where that penalty was affixed by the laws of such Territory, was repealed by section 3 of the Act of January 15, 1897, for it is expressly provided by that section, "that the punishment for any offense specified by the *Statutes* of the United States, except in sections 5332, 1342, 1624, 5339 and 5345, *Revised Statutes*, is abolished, Congress having retained the death penalty as to the offenses enumerated in those sections, and abolished it as to all other sections of the Revised Statutes where affixed, there was no statute save the statute of March 3, 1885, to which the repealing clause of section 3 of the Act of January, 1897, could apply. And as has already been shown in construing an Act of the legislature, each section, clause and word should be given effect if possible.

In conclusion defendant contends that Congress by the Act of January 15th, 1897, intended to diminish, lessen the penalty pro-

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vided by the Act of March 3d, 1885, for the act with which he is charged when committed by one Indian against another, as well as in the case of white men committing crimes against the laws of the United States in which the penalty of death was affixed, for that:

1st. He could not be convicted under section 1 of the Act of January 15th, 1897, of either the crime of murder or rape, but only under section 9 of the Act of March 3d, 1885.

2nd. Being an Indian, one of a particular class, and only amenable under the law for specific acts, with a specific penalty attached, within contemplation of the act of March 3d, 1885, he came within that clause of section 3 of the Act of 1897, which provides that "when a person is convicted of an offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life, or no penalty could be imposed."

3d. That by section 2 of the Act of January 15th, 1897, the penalty of death prescribed by section 5332, being the section of the Revised Statutes defining treason, the gravest crime known to law, is abolished.

4th. That the penalty of death, specifically defined and specifically punished under and by virtue of the provisions of sections 5365, 5368, 5369, 5370, 5371, 5372, 5373, 5374, 5375, 5376, 5385 and 5387, is abolished under and by virtue of the Act of January 15th, 1897, section 3.

5th. That under section 3 of the Act of January 15th, 1897, while a white man may be sentenced to the punishment of death, an Indian is only liable to imprisonment at the discretion of the Court.

It would have been entirely unnecessary for Congress to have added section 5 to the Act of 1897, and placed the punishment for rape by an Indian at imprisonment in the discretion of the Court, but for the purpose of relieving him from the penalty of imprisonment at hard labor for life, imposed by section 2 of the Act of 1897, and also to carry out the purpose of Congress to reduce the cases in which the penalty of death should be imposed.

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